No. 11012

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

CERTIFIED SECURITIES, INC., AN OREGON CORPORATION, APPELLEE

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

BRIEF FOR THE UNITED STATES

J. EDWARD WILLIAMS,
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OPINION BELOW

The district court did not write an opinion.

JURISDICTION

This is an appeal from a judgment dated May 26, 1944, and filed on June 7, 1944 (R. 57–60). Notice of appeal was filed August 23, 1944 (R. 60–61). The jurisdiction of the district court was invoked under the General Condemnation Act of August 1, 1888, 25 Stat. 357, 40 U. S. C. sec. 257, and related statutes (R. 2–3). The jurisdiction of this court is invoked under section 128 of the Judicial Code, as amended, 28 U. S. C. sec. 225 (a).

QUESTION PRESENTED

Whether the trial court on September 3, 1943, had jurisdiction to vacate a prior judgment of March 8, 1943, the term of court at which such judgment was entered having then expired.

STATEMENT

The United States on June 18, 1942, instituted condemnation proceedings under the Second War Powers Act to acquire 25,500 acres of land in Polk County, Oregon, for the establishment of Camp Adair (Civil No. 1304). Included in the proceeding was Tract A–240 containing 320 acres, owned by appellee Certified Securities, Inc. An order granting the Government possession of this tract was entered by the court on the same day the proceeding was instituted (cf. R. 6, 14).

On February 4, 1943, in conformity with what the federal district judges in Oregon deem to be the requirements of Oregon law, the Government filed a separate condemnation petition (Civil No. 1789) covering Tract A–240 (R. 2–8). A declaration of taking was filed on the same day, and there was deposited in the registry of the court as estimated just compensation the sum of $15,009.00 (R. 8–12). Judgment on the declaration of taking was entered on that date (R. 13–15).

On March 8, 1943, there was filed a "Petition For Order Fixing Value and Disbursing Funds on Deposit," executed by appellee, in which it was alleged that "reasonable and just compensation for the taking of said lands [Tract A–240] was and is the sum of

$15,009.00"; appellee in said petition further "agreed that said sum of $15,009.00 was and is the fair market value of the hereinbefore described lands at the time of taking" and that "said sum may be fixed by this Court as the reasonable and just compensation * * * and * * * as the full, final and complete award for the taking of said lands" (R. 38).[1]

On the same day, on motion of the United States, the court entered its judgment decreeing the fair market value of the lands to be $15,009.00, and ordering disbursement of the fund as prayed for in appellee's petition, which disbursement was made (R. 40–47).

Judgments were entered in a similar manner in a number of other tracts in the Camp Adair project. The trial court having later indicated its suspicion that the awards so made were excessive and irregular, the Government on September 3, 1943, filed in the instant case a motion to vacate the order of March 8, 1943, on the ground that it was believed "expedient to introduce further testimony in this cause relating to the fair market value of the property"[2] (R. 47–

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[1] In this petition appellee agreed that the Oregon Mutual Life Insurance Company should be paid $4,248.15 and interest in discharge of a mortgage it held on the tract (R. 37). As the total fund was more than sufficient to pay the mortgage, the Insurance Company had no interest in valuation of the property. Cf. *Silberman* v. *United States*, 131 F. 2d 715 (C. C. A. 1, 1942).

[2] Identical motions were made and granted in all the other cases in which judgments by agreement had been entered. Two of such cases were recently before this Court on the appeal of the landowners from subsequent judgments in lesser amounts. *E. C. Shevlin Co.* v. *United States* (No. 10802), 146 F. 2d 613 (C. C. A. 9, 1944), and *Clair* v. *United States* (No. 10805), 146 F. 2d 617 (C. C. A. 9, 1944), the material facts of which cases are in all re-

48). On that day the trial court entered an order setting aside the prior order fixing value (R. 48–49). Thereafter, appellee filed an answer in which it claimed to be entitled to the sum of $25,000.00 for the taking (R. 49–51). The issue of value was later tried to a jury, which returned a verdict in the sum of $15,700.00, upon which the court rendered judgment on May 26, 1944, the same being filed June 7, 1944 (R. 55–56, 57–60). Since the power of the court to vacate the first judgments was being challenged on appeal by the landowners in the *Shevlin* and *Clair* cases the Government filed a notice of appeal from the final judgment in the instant case (R. 60–61).

ARGUMENT

The order of September 3, 1943, vacating the order entered March 8, 1943, and the judgment subsequently entered on June 7, 1944, are invalid

As already noted, this is one of a series of cases involving different tracts condemned for the Camp Adair project. The material facts of the instant case are identical with those before this Court in the cases of *E. C. Shevlin Co.* v. *United States,* 146 F. 2d 613 (C. C. A. 9, 1944) and *Clair* v. *United States,* 146 F. 2d 617 (C. C. A. 9, 1944). There this Court held that the action of the trial court in setting aside its prior judgments was invalid, reversed the later judgments entered and reinstated the first judgments. That

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spects identical with those of the instant case. The history of this series of cases, including the circumstances which prompted the Government to file the motions to vacate, is not fully set out here, but may be found at pages 3 to 9 of the Government's brief in the *Shevlin* case, No. 10802.

result was based, among other things, on the holding that the trial court had lost jurisdiction to set aside its earlier judgments because of the expiration of the term at which such judgments were entered. In the decision in the *Shevlin* case, after noting that the term of court during which the first judgment was entered had expired on July 4, 1943, the Court stated (146 F. 2d 616): "We also agree with appellant's contention stated as fourth above, that even if the order [vacating the first judgment] were otherwise valid the court had no power to make it after the expiration of the term of the District Court."

In the instant case the first judgment fixing value was entered on March 8, 1943 (R. 40–46), during a term of court which expired July 4, 1943 (28 U. S. C., sec. 183). Therefore, on the authority of the decisions in the *Shevlin* and *Clair* cases, *supra,* the order of September 3, 1943, vacating the judgment of March 8, 1943, was void for lack of jurisdiction of the court to make it, and the subsequent judgment of June 7, 1944, should be reversed and the first judgment of March 8, 1943, reinstated.

Appellee may contend that the Government, by reason of having filed the motion to vacate, is estopped to challenge the validity of the order vacating the judgment of March 8, 1943. The principle is recognized that where a party requests the court to rule in a given way on a matter *which the court has jurisdiction to decide,* and the court rules as requested, such party may be estopped to assert on appeal that the court ruled erroneously. Cf. *United States* v. *Wurtsbaugh,*

140 F. 2d. 534 (C. C. A. 5, 1944). But under the circumstances of the instant case, this Court has held in the *Shevlin* and *Clair* cases that when the term ended the judicial power of the court below was exhausted. That being so, the court lacked jurisdiction of the subject matter of the action when, on September 3, 1943, the motion to vacate was filed and the order vacating the prior judgment was entered. This Court in those cases necessarily held that jurisdiction of the subject matter could not be revived in the court after term time by the action of the United States in filing the motion to vacate, and that the order vacating the prior judgment was a nullity. In such a case the controlling principle is that such an order may be challenged, either by direct appeal or collaterally. *Grubb* v. *Public Utilities Commission,* 281 U. S. 470, 475 (1929); *Fraenkl* v. *Cerecedo,* 216 U. S. 295, 303 (1910); *Gainesville* v. *Brown-Crummer Co.,* 277 U. S. 54, 59 (1928). In *Grubb* v. *Public Utilities Commission, supra,* the rule was stated as follows at 281 U. S. 475:

> * * * That the state court had jurisdiction of the parties is plain and not questioned. But the appellant does question that it had jurisdiction of the subject matter—and this *although at the outset he treated that jurisdiction as subsisting and invoked its exercise.* Of course, he is entitled to raise this question *notwithstanding his prior inconsistent attitude, for jurisdiction of the subject matter must arise by law and not by mere consent.* We turn therefore to the grounds on which that jurisdiction is questioned.[3]

[3] Italics supplied.

The United States therefore can challenge the validity of the order vacating the judgment of March 8, 1943.

CONCLUSION

For the reasons hereinbefore stated, the judgment of June 7, 1944, should be reversed, and the judgment of March 8, 1943, should be reinstated.

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